

SPECIAL CIVIL APPLICATION NO. 6161 OF 1984

Date of Decision: 20.11.1995

FOR APPROVAL AND SIGNATURE

THE HON'BLE MR. JUSTICE N N MATHUR

1. Whether Reporters of local papers may be allowed to the judgment?
2. To be referred to the Reporter or not?
3. Whether their Lordships wish to see the fair copy of judgment?
4. Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 or any order made thereunder ?
5. Whether it is to be circulated to the Civil Judge....

Mr A S Vakil, Advocate for the petitioner
Mr J R Nanavaty, Advocate for the respondent

CORAM ; N N MATHUR, J.
(November 20, 1995)

ORAL JUDGMENT

This Special Civil Application has been filed challenging the levy of octroi duty on M.S. re-rolling scrap from old ships brought by the petitioners within the octroi limits of the Municipal Corporation, Bhavnagar at the rate of one paise per rupee ad-valorem under item No.25 of schedule 'B' to the Bhavnagar Municipality Octroi Bye-laws, instead of at the applicable rate of Rs.5.70 per Metric Ton under item No.26 of the said schedule.

2. The petitioners are partnership firms running re-rolling mills. The say of the petitioners is that the

raw material used for re-rolling in the petitioners' mill is re-rollable scrap and not iron plates or circles. Iron plates are manufactured only by the main producers i.e. the Steel Authority of India Ltd, Tata Iron and Steel Co. Ltd. and the Indian Iron and Steel Com. Ltd. and have thickness of 5 m.m. or above. It is also stated that the plates would be too costly a raw material for use in re-rolling mills. One Mr C L Joshi, Head Clerk of Bhavnagar Municipal Corporation has filed an affidavit on behalf of the respondent-Municipal Corporation, Bhavnagar. Before I proceed further, I disapprove the tendency of filing counter affidavit by a Clerk on behalf of the statutory Corporation. Affidavit-in-reply should be filed by a responsible officer of the Corporation.

4. At the outset, Mr J R Nanavaty, learned advocate for the respondent raised following preliminary objections with respect to the maintainability of the present Special Civil Application:

(a) That the petitioners are guilty of suppressing the material fact. They are members of the Indian Steel Re-rollers Association, Bhavnagar and the said Association has filed a Civil Suit which has been registered as Civil Suit No.506/84 and the same is pending in the Court of Civil Judge (SD), Bhavnagar. This material fact has been concealed, and as such the petitioners are guilty of suppression of material fact. Thus they are not entitled to invoke extra ordinary jurisdiction of this Court under Article 226 of the Constitution of India,

(b) That the Indian Steel Re-rollers' Association, Bhavnagar, of which the petitioners are members, has filed a Civil Suit challenging the levy of octroi under entry No.25 of the Bhavnagar Nagarpalika Octroi Rules and the said Association has been permitted by the learned Civil Judge to file the suit in representative capacity after following the procedures provided under Order I Rule 8 of the Code of Civil Procedures.(for short, 'the Code') In the said suit, on an application for interim injunction under Order 39 Rule 1 and 2 of the Code of Civil Procedure read with Section 151 of the Code, was filed seeking ad-interim injunction restraining the respondent from collecting octroi duty under entry No.25 in respect of the disputed material. After hearing the parties, by a detailed order dated 16.7.1984, the learned Civil Judge (SD), Bhavnagar rejected the prayer for interim injunction. The said Association preferred appeal against that order to the Court of District Judge, which has been eventually heard and rejected by order dated 31.8.1984 of Asstt.Judge, Bhavnagar. The petitioners, being members of the

Association, having taken a chance to take the benefit of interim injunction through the Association, have filed the present Application on 10.12.1994 and has prayed for the identical interim relief. This conduct of the petitioners disentitles to invoke the extra ordinary jurisdiction under Article 226 of the Constitution,

(c) That the question involved in the present Special Civil Application is whether the subject-material brought by the petitioner from the Alang Shipbreaking yard of the Bhavnagar Octroi limits falls under entry No.25 were iron plates or under entry No.26 as scrap material, is a question of fact, which depends upon recording of evidence. Thus, this petition involves disputed question of facts, which cannot be decided in a petition under Article 226 of the Constitution of India.

5. I will take up each preliminary objections in seriatim.

(a) So far as the first preliminary objection with regard to suppression of the fact is concerned, Mr A S Vakil, learned Advocate for the petitioners has invited my attention to para 2 of the rejoinder, in which it is stated that the petitioners are not disabled from filing this petition on account of the Indian Steel Re-rollers' Association has filed the Suit. It is also stated that the petitioners or either of them had not appeared in RCS No.506/84 in the Court of Civil Judge (SD), Bhavnagar. Mr Nanavaty, learned Advocate for the respondent has invited my attention to the averments made in para 1.2 in the reply stating that the plaintiff-Association has furnished a list of members on whose behalf the suit was filed and the said list contains name of the petitioners of this Special Civil Application. This fact has not been disputed by the petitioners in the rejoinder. They have simply stated that the averments made therein are not relevant. There only say is that they have not appeared in the said suit. Therefore, the fact of filing of the suit is not denied. In the facts of the case, the petitioners had knowledge of the filing of the suit as members of the Association. The present Special Civil Application has been filed by the petitioner after having failed in obtaining injunction from the trial court and the appellate court through the Association as its member. The petitioners are therefore guilty of suppression of material facts. It is not a case that the petitioners disclose the fact of filing of suit through Association and then taking the stand that they have independent right to maintain the suit or they had not participated in the suit. In that event this Court might have granted ex-parte interim relief or not. The

petitioners have obtained ex-parte order by suppressing material fact, as such they are not entitled to invoke extra ordinary jurisdiction of this Court under Article 226 of the Constitution of India.

(b) So far as the second preliminary objection is concerned, Mr Vakil submits that the petitioners have an independent right to maintain this writ petition. Simply because the petition has been filed by the Association, to which the petitioners are members, they cannot be deprived of their right to challenge the impugned levy of octroi under Article 226 of the Constitution. He also submits that it would not be appropriate to reject this petition at the stage of hearing. It is pointed out that this Special Civil Application was filed in the year 1984, and as such the plea of alternative remedy cannot be taken by the respondent at this stage. He relies on a decision of the Supreme Court in the case of *HIRDAY NARAIN v. I.T. OFFICER BAREILLY*, reported in AIR 1971 SC 33. In that case, it is held that once the petition is entertained, the same should not be rejected on the ground that statutory remedy was not availed of. This authority does not help the petitioners, as in the present case, there is not only the statutory remedy available, but in fact the remedy has been availed and the suit is still pending. The petitioners are availing remedy before two Forum at a time. This plea has been taken by the respondent in the reply filed as back as on 13.1.1985. In view of the aforesaid, I find substance in the preliminary objection raised by the learned Advocate for the respondent.

(c) With respect to the third objection, Mr Vakil submits that simply because there are some disputed questions of fact involved, the petitioner cannot be relegated to the remedy of Civil Suit. He relies on a decision of the Supreme Court in the case of *CENTURY SPINNING & MANUFACTURING CO.LTD. v. ULHASNAGAR MUNICIPALITY*, reported in AIR 1971 SC 1021. He further submits that in the present case, the question involved is not a question of fact, but the question is of identifying the correct entry for the levy of octroi duty and such exercise can be undertaken by exercising powers under Article 226 of the Constitution of India. For this he relies on a decision of the Supreme Court in the case of *DELHI CLOTH AND GENERAL MILLS CO.LTD. v. STATE OF RAJASTHAN & ORS.*, reported in AIR 1980 SC 1552. There is no substance in this contention as the question involved is not simply identifying the entry but it necessarily depends on the question of fact. It is evident from the order of the Asstt.Judge, Bhavnagar that even for deciding

the appeal arising from the order under Order 39 Rule 1 and 2, the Court had to look at the photographs of the iron plates. After seeing the photographs, the Court arrived at the conclusion that they are the photographs of iron plates. In view of the aforesaid, I find substance in this preliminary objection.

6. In view of the aforesaid discussion, I upheld all the three preliminary objections. In the facts of the case, I am not inclined to grant indulgence to the petitioners, in exercise of powers of this Court under Article 226 of the Constitution of India. This Special Civil Application is accordingly rejected. Rule discharged.

The Learned Advocate for the petitioner prays that the interim relief granted by this Court in terms of para 10(D) by order dated 12.12.1984, may be continued for a further period of four weeks. The interim relief shall further continue for a period of eight weeks provided the petitioners deposit the entire amount due within a period of four weeks.

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